No. 18-315

IN THE

Supreme Court of the United States

COCHISE CONSULTANCY, INC., AND
THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,

Respondent.

**On Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit**

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

CORBIN K. BARTHOLD
Counsel of Record
CORY L. ANDREWS
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
cbarthold@wlf.org

January 9, 2019

QUESTION PRESENTED

Whether a relator in a False Claims Act *qui tam* action may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the relator constitutes an "official of the United States" for purposes of § 3731(b)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. THE SECOND OF THE FCA'S TWO LIMITATION PERIODS SERVES A DISTINCT END FOR A DISTINCT PARTY 8

II. THE FCA'S STATUTE OF LIMITATIONS MUST BE READ IN HARMONY WITH THE FCA'S SEAL PROVISION 11

A. The FCA's Seal Provision Creates Due-Process Concerns 12

B. The FCA's Statute Of Limitations Should Not Be Read To Exacerbate The Due-Process Concerns Created By The FCA's Seal Provision 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases:

Am. Civil Liberties Union v. Holder,
673 F.3d 245 (4th Cir. 2011) 13

Boumediene v. Bush,
553 U.S. 723 (2008) 18

CTS Corp. v. Waldburger,
573 U.S. 1 (2014) 4, 16

Graham Cnty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson,
559 U.S. 280 (2010) 1

In re Pharm. Indus. Average Wholesale Price Litig.,
498 F. Supp. 2d 389 (D. Mass. 2007) 13, 16, 17

Univ. Health Servs., Inc. v. United States ex rel. Escobar,
136 S. Ct. 1989 (2016) 1

United States v. The Baylor Univ. Med. Ctr.,
469 F.3d 263 (2d Cir. 2006) 12, 13

United States ex rel. Costa v. Baker & Taylor, Inc.,
955 F. Supp. 1188 (N.D. Cal. 1997) 15, 16

United States v. Griswold,
24 F. 361 (D. Or. 1885) 11

United States ex rel. Lee v. Horizon West, Inc.,
2006 WL 305966 (N.D. Cal. Feb. 8, 2006) 13

Page(s)

United States ex rel. Sanders v. N. Am. Bus Indus., Inc.,
546 F.3d 288 (4th Cir. 2008) 5, 6, 17

United States ex rel. Sarmont v. Target Corp.,
2003 WL 22389119 (N.D. Ill. Oct. 20, 2003) 13

United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah,
472 F.3d 702 (10th Cir. 2006) 10

United States ex rel. Tracy v. Emigration Improvement Dist.,
2018 WL 3111687 (D. Utah June 22, 2018) 4

Statutes:

False Claims Act, 31 U.S.C. §§ 3729-3731

31 U.S.C. § 3730 ..... 3, 5

31 U.S.C. § 3730(a) 3, 9

31 U.S.C. § 3730(b) 5

31 U.S.C. § 3730(b)(1) 3

31 U.S.C. § 3730(b)(2) 3

31 U.S.C. § 3730(b)(3) 13

31 U.S.C. § 3731(b) 4, 8, 17

31 U.S.C. § 3731(b)(1) 4, 8

31 U.S.C. § 3731(b)(2) ..... *passim*

31 U.S.C. § 3731(c) 14

31 U.S.C. § 3733 ..... 9, 14

31 U.S.C. § 3733(a)(1) 16

Page(s)

Miscellaneous:

Department of Justice, *Fraud Section*, https://perma.cc/3BXV-GVXD (Oct. 20, 2014) 9

Department of Justice, *Two U.S. Contractor Employees Sentenced for Kickback Conspiracy and Tax Crimes Related to Iraq Reconstruction Efforts*, https://perma.cc/KS8Y-YNJZ (Oct. 10, 2012) 3

Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for* Qui Tam *Complaints Filed Under the False Claims Act*, 38 Seattle U. L. Rev. 901 (Spring 2015) 9, 10

Laura Hough, *Finding Equilibrium: Exploring Due Process Violations in the Whistleblower Provisions of the Fraud Enforcement and Recovery Act of 2009*, 19 Wm. & Mary Bill Rts. J. 1061 (May 2011) 14

Michael Lockman, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. Chi. L. Rev. 1559 (Summer 2015) 10

S.Rep. No. 99-345 (1986) 13

INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It has appeared as *amicus curiae* before this Court in important False Claims Act cases. See, e.g., *Univ. Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016); *Graham Cnty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 559 U.S. 280 (2010).

Government fraud investigations are usually long—sometimes *very* long. Recognizing this, Congress, in 1986, amended the False Claims Act's statute of limitations to ensure that the government has ample time to conduct an investigation and decide whether to act. The old statute of limitations—still in place—supplies a flat six-year period within which to sue. The 1986 amendment adds that, within a *ten*-year outer boundary, the government may sue within three years of when it learns or should learn of a fraud against it.

Although she may sue as a relator under the False Claims Act, a private party does not—or, at least, should not—need an unusually lengthy limitation period. She hardly need investigate her claims, the details of which she typically knows firsthand; nor need she run them through a

---

[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the brief's preparation or submission. All parties have consented to the brief's being filed.

government bureaucracy. She can cut to the quick and sue. It is clear therefore that Congress did not have her in mind when it added a ten-year repose provision.

When a relator sues under the False Claims Act, her complaint remains under seal while the government considers whether to intervene in the lawsuit. Although it is supposed to spend no more than a few months deciding whether to intervene, the government often takes several years. (To repeat: government investigations are usually long.) If a relator may wait up to ten years to sue, and the government may *then* spend several years investigating, before a complaint is served on the defendant, serious due-process concerns arise. It should not be lightly assumed that Congress intended to let a dozen or more years pass before a fraud defendant is first instructed in the accusations against it.

WLF urges the Court to restrict relators to the False Claims Act's original, and abundant, six-year limitation period.

STATEMENT OF THE CASE

After invading Iraq in 2003, the United States hired The Parsons Corporation to collect munitions Iraqi forces had abandoned as they retreated or surrendered. Pet. App. 3a. Parsons, in turn, needed to hire someone to secure the cleanup sites. Cochise Consultancy, Inc., allegedly bribed individuals at Parsons and in the Army Corps of Engineers to ensure that it won the security sub-contract. *Id.* at

3a-5a. Cochise supplied the pertinent security service from February to September 2006. *Id.* at 5a.

Billy Joe Hunt worked on Parsons's cleanup project. *Id.* at 3a. On November 30, 2010, Hunt told the FBI about Cochise's alleged bribes. *Id.* at 5a. He then went to prison for his part in a separate kickback and tax-fraud scheme. *Id.*; Department of Justice, *Two U.S. Contractor Employees Sentenced for Kickback Conspiracy and Tax Crimes Related to Iraq Reconstruction Efforts*, https://perma.cc/KS8Y-YNJZ (Oct. 10, 2012). After leaving prison, he sued Parsons and Cochise under the False Claims Act.

The False Claims Act sets forth, at 31 U.S.C. § 3730, two distinct rights of action. First, the United States may sue on its own behalf. *Id.* at § 3730(a). Second, a private party may bring a *qui tam* action—that is, an action in which, proceeding as a "relator," the party acts in the government's name. *Id.* at § 3730(b)(1). A relator files her action under seal, so that the government can investigate her claims and decide whether to intervene in (and, in effect, take over) the lawsuit. *Id.* at § 3730(b)(2). In Hunt's case the government declined to intervene.

Hunt filed his complaint on November 27, 2013, more than six years after the alleged fraud occurred, and more than three years after Hunt discovered it. This timing matters, because the False Claims Act's statute of limitations, 31 U.S.C. § 3731(b), provides:

> A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 [i.e., the fraud] is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

In short, § 3731(b) contains (1) a six-year limitation period and (2) a three-year limitation period cabined by a ten-year repose period. See generally *CTS Corp. v. Waldburger*, 573 U.S. 1, 7-10 (2014) (discussing the distinction between a limitation period and a repose period). But cf. *United States ex rel. Tracy v. Emigration Improvement Dist.*, 2018 WL 3111687 *3 n.5 (D. Utah June 22, 2018) (concluding that § 3731(b)(1)'s six-year period is, like § 3731(b)(2)'s ten-year period, a period of repose).

Under § 3731(b)(1), Hunt's action is barred: Hunt filed more than six years "after the date" of the alleged "violation." Under § 3731(b)(2), however, things are more complicated. No one disputes that Hunt sued within ten years of Parsons's and Cochise's alleged fraud. But Hunt must also establish both (1) that he may invoke § 3731(b)(2) in

the first place and (2) that the pertinent "official of the United States" learned of the alleged violation less than three years before Hunt sued.

Granting motions to dismiss, the district court concluded that Hunt cannot overcome these hurdles. In the trial court's view, either only the United States may invoke § 3731(b)(2), or Hunt is himself the relevant "official of the United States" whose knowledge of the alleged violation triggered the three-year limitation clock. Pet. App. 37a-39a & n.6.

The Eleventh Circuit reversed. Allowing Hunt to invoke § 3731(b)(2), it concluded that "the phrase 'civil action under section 3730' ... includes § 3730(b) *qui tam* actions when the government declines to intervene." Pet. App. 14a. And it declared that the three-year limitation period in § 3731(b)(2) can be triggered only by a true "official of the United States"—not by a relator acting on the United States' behalf. *Id.* at 29a-31a.

This Court agreed to decide both "whether a relator ... may rely on ... § 3731(b)(2)" and "whether the relator constitutes an 'official of the United States' for purposes of [that] section." (Pet. Br. i.) We address only the first of these two issues.

SUMMARY OF ARGUMENT

There are a number of signs that only the government may invoke § 3731(b)(2). For one thing, § 3731(b)(2) "refers only to the United States—and not to relators." *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008). For another thing, letting a relator invoke

§ 3731(b)(2) would "produce the bizarre scenario in which the limitations period in a relator's action depends on the knowledge of a nonparty to the action." *Id.* And Congress appears to have lifted the language in § 3731(b)(2) directly from a tolling statute "that applies only to actions brought by the government." *Id.* at 294. These points, and more, are ably presented by Parsons and Cochise.

We write to expand on one reason, and to add another, why § 3731(b)(2) is unavailable to relators:

1. The point of allowing *qui tam* actions is to incentivize private parties promptly to raise claims of fraud against the government. Once she learns of fraudulent conduct, a private party can, more or less, proceed straight to filing a lawsuit under the False Claims Act. The government cannot act with such dispatch. Before suing, it must conduct a multi-agency investigation, compile the work of numerous officials, and run the proposed lawsuit through a formal approval process. The ten-year repose period in § 3731(b)(2) ensures that the government can, in most cases, complete its pre-lawsuit peregrinations and still file a timely complaint. That repose period serves no comparable purpose for a private party.

2. A government investigation is a common feature of a private *qui tam* action and a government False Claims Act action. There is, however, a key distinction: when the government sues, the investigation *precedes* the lawsuit; whereas when a relator sues, the investigation usually *follows* the lawsuit. When the government sues at the edge of a ten-year period, the time between the events at issue

and the commencement of the lawsuit is—about ten years. But if a relator sues at the edge of such a period, the lawsuit is likely still *years away* from commencing. The lawsuit will remain under seal, and the defendant ignorant of the claims against it, while the government investigates the relator's claims and decides whether to intervene. So although the repose period in a government lawsuit is never more than the ten years set forth in § 3731(b)(2), that period could in a private lawsuit stretch—in defiance of the statute's text ("*in no event* more than 10 years")—without limit. It could stretch for ten years plus as long as the government cares to investigate—in other words, a mighty long time.

Not only does the defendant have no right to receive notice of the allegations against it while the lawsuit is under seal; it has no right to conduct discovery parallel to the government's investigation. When the lawsuit is unsealed many years after the events in question, the government is armed with all the evidence it needs, while the defendant must begin compiling its (incredibly stale) evidence from scratch.

Allowing a private party to invoke § 3731(b)(2) creates a lopsided litigation protocol, in which every advantage rests with the relator and the government. If today the Court opens § 3731(b)(2) to private parties, tomorrow it will have to decide whether the Due Process Clause has anything to say—as it almost surely does—about letting the government complete unilateral discovery before serving a complaint full of moldy allegations. Rather than invite such an issue, the Court should simply adopt the more sensible reading of

§ 3731(b)(2), under which only the government may (at times) take up to ten years to sue.

ARGUMENT

I. THE SECOND OF THE FCA'S TWO LIMITATION PERIODS SERVES A DISTINCT END FOR A DISTINCT PARTY.

The debate over whether a private party may invoke § 3731(b)(2) centers on statutory text. This, of course, is just as it should be. And the text is plain. The three-year limitation period in § 3731(b)(2) begins to run when "facts material to the right of action" become known, or reasonably knowable, to "the *official of the United States* charged with responsibility to act in the circumstances" (emphasis added). Section 3731(b)(2) points directly at the party that may invoke § 3731(b)(2)—the United States.

And as Parsons and Cochise thoroughly explain, the False Claims Act's structure and purpose confirm what § 3731(b)'s text makes clear: a private party has six years, not up to ten, to bring a *qui tam* action.

But after the many strong interpretive grounds for accepting Parsons's and Cochise's position have been reviewed, it is still worth asking a simple question. The False Claims Act long contained one limitation period—the six-year period that today resides in § 3731(b)(1). Then, in 1986, Congress added the alternative period that resides in § 3731(b)(2). The question is this: Why would

Congress place two distinct limitation periods in the False Claims Act?

The answer is as obvious as it is compelling: the government moves slowly.

The False Claims Act says that "the Attorney General diligently shall investigate" claims of fraud against the government. 31 U.S.C. § 3730(a). It is not in the nature of a "diligent" government investigation to proceed quickly, and investigations under the False Claims Act are no exception. In investigating allegations of fraud, the Department of Justice's Fraud Section must "work closely with the Department of Justice's Criminal Division, US [Attorneys Offices], the Federal Bureau of Investigation, and the Offices of the Inspectors General of [government] agencies." Department of Justice, *Fraud Section*, https://perma.cc/3BXV-GVXD (Oct. 20, 2014). To assist the Fraud Section, the pertinent government agencies must, in turn, "enlist a myriad of [their] own program officials," "quality assurance representatives," and "other knowledgeable witnesses" to evaluate the allegations. Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for* Qui Tam *Complaints Filed Under the False Claims Act*, 38 Seattle U. L. Rev. 901, 919 (Spring 2015). The government will likely also question the alleged fraudster; the False Claims Act empowers the government to conduct such one-sided discovery without filing a lawsuit. 31 U.S.C. § 3733. If all this investigating reveals that fraud likely occurred, the government will conduct a final review process before the Fraud Section's director formally approves the filing of a lawsuit. See Hesch, supra, at 919.

All told, the government is likely to need "months or years of investigations, interviews, subpoenas, and discussions with defense counsel" before it is ready to file a complaint. Michael Lockman, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. Chi. L. Rev. 1559, 1565 (Summer 2015). It can take "between *three and six years* for the government to properly investigate and bring a complex fraud case." Hesch, supra, at 903 (emphasis added).

While considering what came to be the 1986 amendments to the False Claims Act, the House Judiciary Committee heard testimony from the head of the Department of Justice's Civil Division. He informed the committee that a six-year limitation period is sometimes too short to accommodate the slow-moving gears of government:

> I can say[,] Mr. Chairman, that I frequently see requests to sue come in right on the brink of the [six-year] statute of limitations, and sometimes beyond, . . . because it has just taken that long to discover the fraud *and get a case ready to pursue*. [A longer limitation period] would give *us* a little more flexibility in bringing some cases that otherwise would be barred.

United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 724 n.31 (10th Cir. 2006) (emphasis added) (quoting *False Claims Act Amendments: Hearings Before the H. Subcomm. On Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 99th Cong. 118, 159

(1986)). Congress obliged the government and created the three-year discovery rule and ten-year repose in § 3731(b)(2).

A relator's situation is something else altogether. A relator need not wait while his accusations percolate through a bureaucracy. Nor need he conduct a lengthy investigation; usually, in fact, he is a firsthand witness of the alleged fraud. To begin his lawsuit, he need do little more than choose an attorney, tell her the details of the case, and sign the contingency-fee agreement. His lawyer can trot into the courthouse before the federal prosecutor has laced her shoes.

A *qui tam* action "compare[s] with the ordinary methods as the enterprising privateer does to the slow-going public vessel." *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885). It makes no sense, therefore, to assume that § 3731(b)(2), with its ten-year repose period, is available equally to the government and to private parties. To the contrary, the only safe assumption is that Congress added § 3731(b)(2) to accommodate plodding government investigations. Congress granted the government extra time to shoulder its unique investigative burden.

II. THE FCA'S STATUTE OF LIMITATIONS MUST BE READ IN HARMONY WITH THE FCA'S SEAL PROVISION.

The False Claims Act authorizes the government to investigate the allegations in a *qui tam* action *after* the action begins, but *before* the action is disclosed. The government is empowered, in effect, to

spend months or even years conducting discovery before the defendant may even read the complaint. This constitutionally suspect arrangement becomes constitutionally intolerable if a relator may, by invoking § 3731(b)(2), take up to ten years simply to *file* the lawsuit that *starts* the government's lengthy, intrusive, one-sided, secret investigation. At the very least, allowing a relator up to ten years to file suit creates constitutional problems that are best avoided.

A. The FCA's Seal Provision Creates Due-Process Concerns.

Section 3731(b)(2) was just one of several provisions Congress added to the False Claims Act in 1986. It also added (among other things) a rule requiring a relator to file her complaint under seal. The rule states that "the complaint shall be filed in camera"; that it "shall remain under seal for at least 60 days"; and that it "shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2).

The seal rule's primary purpose is to keep the defendant in the dark while the government investigates the relator's claim and decides whether to intervene in the suit. "By design, the seal provision . . . deprives the defendant in an FCA suit of the notice usually given by a complaint." *United States v. The Baylor Univ. Med. Ctr.*, 469 F.3d 263, 270 (2d Cir. 2006), superseded by statute on other grounds, 31 U.S.C. § 3731(c).

Congress understood that not every investigation can be completed within 60 days, and so it

authorized the trial court, on the government's motion and "for good cause shown," to extend the seal. *Id.* § 3730(b)(3). Congress placed no limit on either the number of extensions the government may obtain or the time the complaint may remain under seal. But in "the vast majority of cases," the Senate Judiciary Committee opined, "60 days is an adequate amount of time to allow Government coordination, review, and [a] decision" on whether to intervene. S.Rep. No. 99-345 (1986). "Good cause" for extending the seal, the committee continued, should "not be established merely upon a showing that the Government [i]s overburdened." *Id.* The committee expected the trial court to "weigh carefully" each government request to extend a seal. *Id.*

In spite of this guidance, the government often asks for many extensions, and the trial court often grants these *ex parte* requests with little scrutiny. In consequence False Claims Act lawsuits often remain under seal for years on end. See, e.g., *Baylor*, 469 F.3d at 266 (sixteen *ex parte* extension requests granted, resulting in an eight-year seal); *In re Pharm. Indus. Average Wholesale Price Litig.*, 498 F. Supp. 2d 389, 392 (D. Mass. 2007) ("numerous" extensions; nine-year seal); *United States ex rel. Sarmont v. Target Corp.*, 2003 WL 22389119 *1-*2 (N.D. Ill. Oct. 20, 2003) (fifteen extensions; seven-year seal); *United States ex rel. Lee v. Horizon West, Inc.*, 2006 WL 305966 *1 (N.D. Cal. Feb. 8, 2006) (five-year seal); see also *Am. Civil Liberties Union v. Holder*, 673 F.3d 245, 263 (4th Cir. 2011) (Gregory, J., dissenting) (noting that the 60-day limit "is largely illusory" and that many FCA cases "are under seal for at least two years").

While the seal is in place, the government may conduct depositions and serve interrogatories and requests for documents. 31 U.S.C. § 3733. And if the government decides, at long last, to intervene, its complaint will relate back to when the relator filed her complaint. 31 U.S.C. § 3731(c). So the government—assuming it can convince the trial court to go along (and it often can)—may continue its investigation indefinitely, free of pressure from any statute of limitations. The defendant has no reciprocal discovery rights. Nor is it entitled to know the nature of the allegations driving the government's investigation.

"There is a very real danger" that, under this regime of closed judicial proceedings, intrusive but unexplained government inquiries, and years-long delays, "defendants' due process rights have [been] and will be violated." Laura Hough, *Finding Equilibrium: Exploring Due Process Violations in the Whistleblower Provisions of the Fraud Enforcement and Recovery Act of 2009*, 19 Wm. & Mary Bill Rts. J. 1061, 1089 (May 2011).

B. The FCA's Statute Of Limitations Should Not Be Read To Exacerbate The Due-Process Concerns Created By The FCA's Seal Provision.

So the False Claims Act's seal provision is on shaky constitutional ground. The question arises, then, whether any particular reading of the Act's statute of limitations aggravates the constitutional problem.

When the United States brings a False Claims Act suit on its own behalf, the government's investigation of the alleged fraud precedes the action. Once the lawsuit begins, it begins in earnest. Although the ten-year repose period in § 3731(b)(2) is long, that period is—if the government is the plaintiff—the maximum delay that can pass before the defendant learns of the lawsuit and can begin building a defense.

If a private party may use § 3731(b)(2)'s ten-year repose period, the picture is very different. When a relator sues, the lawsuit typically *starts* the government investigation. If a relator may rely on § 3731(b)(2), a defendant can (1) discover it is the target of a government investigation of events that occurred more than a decade ago yet (2) still be several years away from learning the allegations against it. It is quite conceivable that some defendants will not be handed a complaint until 15 or more years after the events in dispute.

True, recognizing that "defendants have a legitimate interest in building their defense while the evidence is still fresh," some district judges will eventually lift a seal against the government's wishes. *United States ex rel. Costa v. Baker & Taylor, Inc.*, 955 F. Supp. 1188, 1189 (N.D. Cal. 1997) (lifting an eighteen-month FCA seal *sua sponte*). But no one is present to press the defendant's interests, and experience shows that, lacking an adversarial presentation of the issues, many judges will simply defer to the government. Left to its own devices, the government will often make a mockery of Congress's insistence that most investigations wrap up within 60 days or so.

The end of a repose period is normally a definitive cutoff, after which a defendant may "put past events behind him." *Waldburger*, 573 U.S. at 9. Unlike a limitation period, which can be tolled, a repose period is "an absolute bar on a defendant's temporal liability." *Id.* at 8. Yet if a relator may invoke § 3731(b)(2), that section's repose period is *not* definitive and *not* absolute. Instead of setting past events aside at the ten-year mark, a potential defendant would have to spend an indeterminate number of years more being wary of an ambush complaint. That is not "repose."

As time passes, moreover, "evidence spoils, memories fade, and prejudice may result." *Pharm. Indus.*, 498 F. Supp. 2d at 399 n.6. And the prejudice is compounded by the parties' asymmetrical access to evidence. The government may complete a full investigation—and share what it has learned with the relator, see 31 U.S.C. § 3733(a)(1)—before the defendant even knows what the allegations are. Sometimes, it seems, the government will even build its whole case and only then, when it is good and ready, let the defendant in on the lawsuit. See *Costa*, 955 F. Supp. at 1190 ("The government appears to be fully engaged in its discovery, without giving the defendants the opportunity even to answer the complaint."). When the years have passed and the seal is lifted, the government's key witnesses will have been interviewed. At least some of the defendant's key witnesses, meanwhile, will be retired, remote, reclusive, senile, or deceased. The longer the delay, the fewer witnesses available.

At some point the "egregious delay" created by a *qui tam* seal, along with the one-sided discovery that occurs while the seal is in place, becomes "sufficiently prejudicial" to violate the defendant's right to due process. *Pharm. Indus.*, 498 F. Supp. 2d at 399. When does such prejudice graduate from merely unfortunate to flatly unconstitutional? Congress's answer, at least, is right in the statute. Section 3731(b) resolves the equation *alleged false claim + x years + sealed lawsuit + lengthy one-sided government investigation + service of complaint = constitutional*. According to § 3731(b), *x* may equal six but not ten. Ten years is allowed only when *x years* and *lengthy one-sided government investigation* are combined into one overlapping period.

One way or the other, a government investigation is going to introduce delay into a False Claims Act dispute. The most sensible reading of § 3731(b)(2) is as a license for the government to introduce that delay *before* a False Claims Act suit begins. Under such a reading, § 3731(b)(2) is unavailable to a private party.

Tardy relators regularly test the outer bounds of the False Claims Act's statute of limitations (see, e.g., *Sanders*, 546 F.3d at 296 [collecting examples]), and the government regularly tests the outer bounds of its investigative authority (see the examples of lengthy seals, above). So if the Court eschews the narrower, government-only reading of § 3731(b)(2), it will one day have to decide whether unsealing a complaint containing 12-, 15-, or 18-year-old allegations violates due process. The Court should instead "construe the statute to avoid constitutional

problems." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008). Even if the broader and narrower readings of § 3731(b)(2) stand in equipoise—they don't—the narrower reading should govern.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

CORBIN K. BARTHOLD
Counsel of Record
CORY L. ANDREWS
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
cbarthold@wlf.org

January 9, 2019